

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

UNITED STATES OF AMERICA, -
Plaintiff, - Case No. 3:03CR739
- Toledo, Ohio
- September 15, 2004
-vs- -
-
JAMES W. WHEELER, et al., -
-
Defendants. -
- - - - -

TRANSCRIPT OF HEARING
BEFORE JUDGE DAVID A. KATZ

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14:12:30 1 (Commenced at 2:12 p.m.)

14:12:32 2 THE COURT: As you know, I've asked you to
14:12:34 3 appear today to make my job easier for once by
14:12:38 4 articulating some of the issues which I keyed in on. I
14:12:50 5 can see already by a reading of the last memoranda that
14:12:56 6 one of those has already been resolved as between the
14:13:00 7 parties, and that is that there's a single enterprise.
14:13:06 8 And the issue, it seems to me -- let me restate that; a
14:13:12 9 significant issue then, it seems to me, is: Does a
14:13:22 10 single enterprise create the possibility of multiple
14:13:32 11 conspiracies, and is it the issue of multiple
14:13:40 12 conspiracies, or is it a single conspiracy, or single
14:13:48 13 conspiracies in areas of violation, RICO, RICO
14:13:54 14 conspiracy, narcotics, guns, comprise the multiple acts
14:14:06 15 of various actors who are a part of the conspiracy?

14:14:12 16 Now, I know that's not very artfully
14:14:16 17 articulated, but the brilliance of those in attendance
14:14:24 18 should quickly germinate some responses. How much time
14:14:34 19 do you need, both sides -- each side?

14:14:36 20 MR. DOUGHTEN: Your Honor, I'm sure the
14:14:38 21 Court doesn't want us to regurgitate what we already
14:14:40 22 provided the Court. Additionally, any points we want
14:14:44 23 to make, minutes. I don't think it's a lot. I think
14:14:48 24 we're down to --

14:14:48 25 THE COURT: Each of you can have a half

14:14:50 1 hour.

14:14:52 2 MR. DOUGHTEN: That would be plenty.

14:14:54 3 THE COURT: Since you are the movant --

14:15:02 4 MR. DOUGHTEN: Sure. A couple points we
14:15:04 5 want to make. The Court's aware of the issues in the
14:15:08 6 indictment. The government dismissed Count 3, which was
14:15:12 7 a drug conspiracy; however, racketeering act 17
14:15:14 8 essentially had the exact same language, in addition to
14:15:18 9 racketeering act 7. That's what we're talking about
14:15:20 10 today. One of the things on whether this is separate
14:15:24 11 agreements or separate conspiracies within the RICO,
14:15:26 12 which would have it avoid the jeopardy problem, I'd like
14:15:32 13 to note for the record that clearly no one has treated
14:15:36 14 it as a separate conspiracy. I notice in the PSI the
14:15:42 15 drug amounts are aggregated as if they were one act, one
14:15:46 16 conspiracy. So that clearly if there were separate and
14:15:50 17 distinct conspiracies within the RICO, I guess, only the
14:15:56 18 amounts that could be attributed to that separate and
14:16:02 19 distinct conspiracy could aggregate. Clearly the
14:16:06 20 government is going to -- I and I don't know, because I
14:16:08 21 haven't spoken to them about this, but if the government
14:16:12 22 is arguing for each defendant that they're responsible
14:16:14 23 for the total amount of drugs that each member of the
14:16:20 24 enterprise or all the enterprise accounted for, clearly
14:16:26 25 they're treating this as if there's one conspiracy, and

14:16:30 1 they have the same purpose, and that is to sell drugs.

14:16:34 2 The case that I want to address, we came up
14:16:36 3 with an additional case, Judge, for the record the case
14:16:40 4 is United States versus Montel Humphrey; the cite is 287
14:16:48 5 F.3d 422. This is a Sixth Circuit case decided in
14:16:52 6 2002. And I think it has one of the better
14:16:56 7 definitions. This is not a RICO case. In Humphrey
14:16:58 8 the government argued that if charged for distinct
14:17:04 9 conspiracies -- Judge, you can turn to page 13.

14:17:08 10 THE COURT: Judge Moore had to write this
14:17:12 11 opinion.

14:17:14 12 MR. DOUGHTEN: Page 13. This case is not
14:17:16 13 generated as part of the case.

14:17:18 14 The government tried to argue that there
14:17:18 15 were distinct conspiracies in that case. And I think
14:17:22 16 what's important about that is the Sixth Circuit cited
14:17:24 17 other cases, which I won't cite here, stating that the
14:17:38 18 key to establishing whether distinct subagreements are
14:17:42 19 to encompass within a single conspiracy, it is to
14:17:46 20 determine whether the different subgroups are acting in
14:17:48 21 furtherance of one overarching point.

14:17:52 22 What struck me about this language is the
14:17:56 23 whole purpose of an enterprise, and its mention in the
14:18:00 24 indictments in both the Tampa case and the Toledo case,
14:18:04 25 is the purpose, and the means and method to accomplish

14:18:08 1 the purpose. And clearly the purpose in both
14:18:12 2 indictments is the overarching plan. The enterprise
14:18:16 3 is, in fact, the overarching plan. So that what
14:18:20 4 Humphrey indicates is that the government can't make out
14:18:26 5 separate charges and separate counts because in this
14:18:28 6 case the government tried to distinguish -- and I
14:18:32 7 haven't seen these terms before -- between a hub
14:18:34 8 conspiracy and a chain conspiracy. And basically the
14:18:38 9 Sixth Circuit indicated that you can't do that. If you
14:18:40 10 can show that there's one overarching plan, then, in
14:18:44 11 fact, there is one conspiracy. That emerged in that
14:18:50 12 particular case.

14:18:50 13 THE COURT: Let me interrupt for just a
14:18:52 14 minute. When I have a question, I don't like to
14:18:56 15 interrupt. I'll just hold up my hand, and when you
14:19:00 16 come to a normal natural stopping place, stop, and I'll
14:19:06 17 ask you the question.

14:19:08 18 MR. DOUGHTEN: Okay. I'm at a normal
14:19:14 19 stopping place right now.

14:19:16 20 THE COURT: I didn't read this case, which
14:19:20 21 was written by Judge Cole, but it seems to me that what
14:19:28 22 is being said -- who else was on this panel?

14:19:48 23 What I was struck with, not the hub type of
14:19:52 24 thing; I articulated it differently. What has the
14:20:00 25 defendant been charged with? The defendant has been

14:20:06 1 charged with a conspiracy. It is the conspiracy which
14:20:12 2 is the violation. And the evidence of violation are
14:20:16 3 multiple acts by various co-conspirators. Now, I
14:20:22 4 believe what you are saying, and maybe what this case is
14:20:28 5 saying that you are citing to, is that you can't say,
14:20:34 6 all right, we're going to take these acts and these
14:20:40 7 co-conspirators and use them in Tampa for the single
14:20:48 8 defendant, Mr. Wheeler. And we'll take these
14:20:52 9 co-conspirators, and some but mostly different acts, and
14:21:00 10 convict him of the same conspiracy. Is that basically
14:21:04 11 what you're saying?

14:21:06 12 MR. DOUGHTEN: If it wasn't, it is now.
14:21:10 13 Yes. One of the points about that is that if the
14:21:16 14 government would be allowed to do this, the whole
14:21:18 15 purpose of double jeopardy is to not put Mr. Wheeler and
14:21:22 16 people like him through the same trial essentially, same
14:21:28 17 witnesses, indefinitely. If the government's position
14:21:30 18 is correct, Judge, they could have limited the
14:21:34 19 racketeering acts to the northeast -- this district, the
14:21:38 20 Northern District of Ohio. They can try him again in
14:21:42 21 Indianapolis with separate actions, arguably again in
14:21:46 22 Milwaukee. There would be no stop to the number of
14:21:50 23 trials that they could put Mr. Wheeler through. It
14:21:54 24 would be totally based on discretion of which overt acts
14:21:58 25 the government left within the indictment. Because you

14:22:00 1 could always fashion an indictment to cover the 1980s,
14:22:06 2 late 1980s, early 1900s.

14:22:10 3 THE COURT: Well, he's not that old.

14:22:14 4 MR. DOUGHTEN: 1990s. I'm sorry. 1990s.

14:22:18 5 In what the government is terming as
14:22:22 6 separate and distinct conspiracies, you could have the
14:22:24 7 same enterprise, and clearly there are acts within each
14:22:28 8 conspiracy by the conspirators, and there would be no
14:22:32 9 limit to the number of RICO actions which could be taken
14:22:34 10 on the same defendants, not just Mr. Wheeler, but any of
14:22:38 11 them. Again, I think double jeopardy is designed to
14:22:40 12 stop that. That is where the one plan, the one
14:22:44 13 overarching plan comes in, because that is the
14:22:46 14 enterprise. That's the purpose of the conspiracy.
14:22:50 15 We're talking about a RICO conspiracy. And always in
14:22:52 16 any RICO there is going to be separate and distinct acts
14:22:56 17 by separate and distinct members of the enterprise.
14:22:58 18 That's the purpose for the statute. Again, I think
14:23:04 19 under Humphrey, in the cases cited by the Sixth Circuit,
14:23:10 20 that's the only protection Mr. Wheeler would have for,
14:23:12 21 again, being reindicted in another location. And
14:23:16 22 arguably they could still do it because, as the Court is
14:23:20 23 aware, the number of witnesses who testified in Florida,
14:23:24 24 who testified here, if that's not a bar, there could be
14:23:26 25 another enterprise action taken in another location.

14:23:30 1 There was -- for instance, I know there was a lot of
14:23:34 2 argument that other acts were use in this case which
14:23:36 3 were admissible to show the purpose of the enterprise,
14:23:40 4 but what's to stop the government from charging with
14:23:42 5 another RICO and using the other acts that weren't part
14:23:44 6 of the racketeering acts here in another location? And
14:23:48 7 again, the only protection that Mr. Wheeler and people
14:23:52 8 in his stead have is that, this purpose. It's got to be
14:24:04 9 protected.

14:24:06 10 THE COURT: What's really bothering me is if
14:24:08 11 we assume, as the government asserted, that there was a
14:24:16 12 single enterprise, and it was OMC, then is that the
14:24:26 13 position with which the government is stuck on counts 1
14:24:30 14 and 2, RICO; and Counts 3 and 4, narcotics and firearms
14:24:40 15 conspiracy? Or are those subconspiracies within the
14:24:54 16 same enterprise? It doesn't seem like that should be a
14:25:00 17 logical step or conclusion.

14:25:06 18 MR. DOUGHTEN: My answer is obviously yes.
14:25:08 19 And let me clarify the position. I think one of the
14:25:10 20 reasons that we addressed the means and methods of the
14:25:14 21 indictments, although understandably those are not
14:25:18 22 elements, but the reason they were addressed in the
14:25:20 23 briefs, and the reason why this was important is because
14:25:24 24 I think that they're almost identical. And I think
14:25:28 25 that is the proof, if you will, that it's the same

14:25:34 1 enterprise with the same purpose. The conspiracies,
14:25:36 2 whether singularly or independently, are all there to
14:25:42 3 fulfill the purpose of the enterprise. That's --
14:25:46 4 again, that's the purpose of the RICO statute. And so
14:25:48 5 to allow the government to use RICO, to gather in
14:25:54 6 everybody within the OMC as a group, and then allow them
14:26:02 7 to charge independently for the subconspiracies, seems
14:26:08 8 to fly in the face of the purpose of the double jeopardy
14:26:12 9 protections and the double jeopardy clause.

14:26:18 10 I'm sure the Court's aware the firearms
14:26:22 11 conspiracy is not relevant.

14:26:24 12 THE COURT: Not in this case.

14:26:26 13 MR. DOUGHTEN: But for purposes of the
14:26:28 14 double jeopardy.

14:26:28 15 THE COURT: It's the argument I was looking
14:26:30 16 at. Because my recollection is that Mr. Wheeler was
14:26:32 17 found not guilty.

14:26:36 18 MR. DOUGHTEN: The firearms, yes.

14:26:36 19 THE COURT: On Count 4?

14:26:38 20 MR. DOUGHTEN: Correct. Essentially, Your
14:26:44 21 Honor, that's the argument. I think it's clear.
14:26:46 22 Again, I think just to sum it up again, the conspiracies
14:26:52 23 are the actions of the enterprise -- of the enterprise
14:26:56 24 member to fulfill the purpose of the enterprise. The
14:27:00 25 means and methods of doing so are the actions which,

14:27:04 1 according to the government, if I'm reading it
14:27:08 2 correctly, are the actions which are the separate and
14:27:10 3 distinct conspiracy.

14:27:12 4 THE COURT: Thank you.

14:27:14 5 MR. WILSON: I think with all due respect
14:27:18 6 that thus far the analysis has gone somewhat astray in
14:27:22 7 this respect: We are ignoring to a certain extent the
14:27:28 8 way in which the RICO statute works, and we are ignoring
14:27:34 9 to a certain extent the way in which Congress intended
14:27:36 10 the RICO statute to work. We have to a certain extent
14:27:42 11 focused upon the conspiracy charge and the consent of
14:27:46 12 conspiracy, without fully identifying what RICO means
14:27:50 13 and what the RICO statute provides for. And I think
14:27:54 14 that's fundamentally what is at issue here. I believe
14:27:56 15 that the motion, of course, challenges all three counts,
14:28:00 16 Counts 1, substantive RICO; Count 2, RICO conspiracy;
14:28:04 17 and Count 3, the drug conspiracy.

14:28:06 18 Let me first look at the RICO charges, and
14:28:10 19 let's leave aside the drug conspiracy just for the sake
14:28:12 20 of argument at the moment.

14:28:14 21 With regard to RICO, the defense is
14:28:18 22 contending in essence that the identity of the
14:28:20 23 enterprise in effect pollutes both indictments in that
14:28:26 24 because the racketeering acts were committed by persons
14:28:32 25 to fulfill the objectives of the enterprise, that

14:28:36 1 therefore we must be talking about the same offense. I
14:28:40 2 think that's a fair reading of the argument that has
14:28:42 3 been made here today. That is a complete
14:28:46 4 misunderstanding, however, of the enterprise context in
14:28:50 5 RICO generally and specifically in this particular case.
14:28:52 6 The enterprise in this particular case is a lawful
14:28:56 7 organization, the Outlaw Motorcycle Club. No
14:29:00 8 contention has ever been made otherwise. No statement
14:29:02 9 by the government has ever suggested otherwise.

14:29:08 10 The racketeering acts, far from having the
14:29:12 11 effect of perpetuating the enterprise, in some respects
14:29:16 12 were counter to the lawful purposes of that enterprise
14:29:18 13 which we presume is to be a motorcycle club and engage
14:29:22 14 in otherwise lawful activities. And this illustrates a
14:29:26 15 very important point under RICO. All the enterprise
14:29:30 16 element does is establish the legal umbrella, if you
14:29:40 17 will, that binds the various defendants together. And
14:29:44 18 that's the only purpose that it serves. I would
14:29:50 19 acknowledge we might be in an entirely different
14:29:52 20 situation if we were talking about an enterprise where
14:29:54 21 the sole purpose of that enterprise was illegal
14:29:58 22 activity. And, in fact, the Court has seen cases,
14:30:02 23 we've cited cases, they've cited cases such as the
14:30:06 24 Patriarch crime family, which exists allegedly for the
14:30:10 25 sole reason of perpetrating violent acts. It's

14:30:12 1 different here in that even though the government in
14:30:16 2 Florida and the government in Toledo sets forth the
14:30:20 3 enterprise as the Outlaws, it does not claim that the
14:30:22 4 Outlaws as a group do nothing but or have no identify
14:30:28 5 extrinsic from the legal aspect of it. This is really
14:30:32 6 important when we look at what the cases have said with
14:30:34 7 regard to how we view double jeopardy because the cases
14:30:38 8 clearly state that even where the identity is the same,
14:30:42 9 even where the enterprise is the same in substance,
14:30:48 10 excessive RICO prosecutions, we look to the racketeering
14:30:50 11 acts to determine whether they, in fact, are the same.
14:30:52 12 And that makes perfectly good sense because there could
14:30:58 13 conceivably be RICO actions filed in multiple
14:31:02 14 jurisdictions across the country involving the Outlaws.
14:31:06 15 Under the reasoning that the defense has offered, would
14:31:10 16 those particular -- would all of those be considered one
14:31:14 17 prosecution subject to double jeopardy if, in fact,
14:31:18 18 there were common defendants in each of those in
14:31:20 19 different areas of the country, even if one -- a RICO
14:31:24 20 charged in California, let's say, alleged a specific
14:31:28 21 pattern of racketeering which was distinct from a
14:31:30 22 pattern of racketeering that was in New York? There
14:31:34 23 seems to be no reason why that should be. And indeed,
14:31:38 24 if you look at the legislative history that's cited in
14:31:40 25 one of the cases that the defense presents, United

14:31:42 1 States v. Dean, you see a pretty clear explanation of
14:31:46 2 exactly what RICO means. And some of the legislative
14:31:50 3 history that they cite in that particular case is quite
14:31:54 4 illustrative of what the statute actually means. In
14:32:00 5 that case the Court states, I'm quoting, "We still
14:32:06 6 perceive an unmistakable congressional purpose to allow
14:32:08 7 a separate unit of RICO prosecution for each distinct
14:32:12 8 pattern of racketeering activity."

14:32:16 9 The Court went on --

14:32:18 10 THE COURT: Let me interrupt because maybe
14:32:20 11 you're going to do it. Well, I understand that. But
14:32:26 12 is the pattern conspiracy to commit one class of crimes,
14:32:36 13 conspiracy to commit the second class, et cetera?

14:32:40 14 MR. WILSON: Now we get into the five step
14:32:42 15 test that the Courts have looked into. I think that's
14:32:44 16 really the nub of it. The defense argument, as I
14:32:48 17 understood it, continuously referred us back to the
14:32:52 18 enterprise, the similarities of the enterprise between
14:32:54 19 the Florida and Toledo indictments. Our point is that
14:33:00 20 tells us nothing. That doesn't advance the inquiry.
14:33:02 21 Instead we're left to look at the actual patterns of
14:33:06 22 racketeering activity. Here the Courts are pretty
14:33:08 23 consistent with regard to how the Courts should look at
14:33:12 24 the patterns of racketeering activity at each
14:33:14 25 indictment.

14:33:16 1 And I would note that with regard to the
14:33:16 2 similarity of the enterprise, we have made the
14:33:20 3 distinction that the Outlaws in this case are a legal
14:33:22 4 entity. That diminishes the importance of the
14:33:26 5 enterprise as being a limiter in some fashion in double
14:33:30 6 jeopardy, and in many other cases, including Dean, the
14:33:34 7 enterprise has been an illegal activity, and yet the
14:33:38 8 Courts have still permitted successive prosecutions
14:33:42 9 where it was shown that the patterns of racketeering
14:33:44 10 activity were, in fact, different.

14:33:48 11 So the Courts really make no distinction
14:33:50 12 between the legal or illegal enterprise. It
14:33:52 13 strengthens our position that, in fact, it is a legal
14:33:56 14 enterprise.

14:34:00 15 THE COURT: So are the Courts telling us,
14:34:02 16 other Courts, that OMC is a legal enterprise through
14:34:12 17 which illegal activity was used in violation of RICO,
14:34:18 18 and that the acts which are charged create the
14:34:32 19 separate -- the right of separate and successive
14:34:38 20 prosecutions?

14:34:38 21 MR. WILSON: That is precisely what the
14:34:42 22 Courts are saying. The Dean case is particularly
14:34:44 23 illustrative of that. After reading it, after looking
14:34:48 24 at the defense brief, here you have a situation where
14:34:50 25 you have a county court and county judge, I believe, who

14:34:52 1 was taking bribes in connection with some events, I
14:34:56 2 can't recall exactly what they were. We had successive
14:34:58 3 RICO prosecutions. In the first prosecution we had two
14:35:04 4 or three bribes in a conviction under RICO. The
14:35:08 5 successive prosecution was other bribes in a somewhat
14:35:12 6 related timeframe, again involving the same enterprise,
14:35:16 7 i.e. this judge using his county judgeship as a
14:35:18 8 racketeering activity. So you had what amounts to and
14:35:24 9 what could arguably be called one common scheme,
14:35:28 10 certainly a common enterprise. Yet when the Court
14:35:30 11 focused, as the law requires it to do, upon the
14:35:34 12 racketeering acts, the Court had no trouble finding that
14:35:38 13 this set of racketeering acts involved a different
14:35:42 14 crime, at least for double jeopardy purposes. Because
14:35:46 15 of the fact, the Courts have long recognized that RICO
14:35:48 16 is a separate animal in that stage which always focuses
14:35:54 17 upon the racketeering acts and not the enterprise for
14:35:56 18 that precise purpose. So we look to the criminality
14:36:00 19 that's set forth in the racketeering acts exclusively to
14:36:04 20 determine whether or not we have a double jeopardy
14:36:06 21 issue. And on this point, the courts are unanimously
14:36:10 22 clear, I think, that the -- there must be a virtually
14:36:16 23 identical overlap with respect to the racketeering
14:36:20 24 activities. If you reach that point, I think cases are
14:36:24 25 abundantly clear, we have to be dealing with essentially

14:36:30 1 the same racketeering acts in order for double jeopardy
14:36:34 2 to apply. The fact that one particular enterprise
14:36:38 3 gives rise to multiple prosecutions means nothing. In
14:36:42 4 fact, Congress intended it. The only question is: Has
14:36:44 5 the government taken the same bite at the apple by
14:36:48 6 charging the defendants with essentially the same
14:36:52 7 racketeering acts, and taken another bite at the apple?

14:36:56 8 THE COURT: So if we approach it as Dean
14:37:00 9 did, as you've articulated Dean did, then double
14:37:06 10 jeopardy bars only successive RICO charges involving
14:37:12 11 both the same enterprise -- we have that here -- and the
14:37:16 12 same pattern of racketeering activity?

14:37:20 13 MR. WILSON: That's correct.

14:37:20 14 THE COURT: And then the determination of
14:37:22 15 what is the same pattern of racketeering activity you
14:37:28 16 leave to the Court, which means I have to determine
14:37:36 17 various factors which include, according to the First
14:37:40 18 Circuit, the nature, the time, the place, the people,
14:37:48 19 and the nature and scope of the activities involved in
14:37:52 20 each indictment.

14:37:54 21 And here is where Messrs. Doughten and
14:38:00 22 Helmick say it's basically the same, Judge.

14:38:04 23 MR. WILSON: And that's why you have to look
14:38:06 24 carefully at the Florida indictment and the Toledo
14:38:08 25 indictments, because when you do that analysis, and of

14:38:12 1 course for double jeopardy purposes we focus upon the
14:38:14 2 charging instruments, and I think it's very clear that
14:38:18 3 that's what we look to. If you look at what Mr.
14:38:20 4 Wheeler was charged with down in Florida and compare it
14:38:22 5 to what he was charged with up here, you find a
14:38:24 6 substantial dissimilarity. But I believe that this
14:38:28 7 really does state the differences between the parties.
14:38:32 8 Their contention is if you look at the totality of the
14:38:34 9 circumstances, it is the same pattern of racketeering.
14:38:38 10 We believe very clearly when you look at the
14:38:40 11 racketeering activities, they are substantially
14:38:44 12 dissimilar. And we've laid out in our brief our claim
14:38:46 13 of dissimilarity. The vast majority of the indictment
14:38:50 14 down in Florida involved a series of bombings that took
14:38:54 15 place down there. And originally Harry Bowman was
14:38:58 16 charged with those bombings. Subsequently they charged
14:39:02 17 Mr. Wheeler. And all of those particular events are
14:39:06 18 completely unrelated.

14:39:10 19 There is some similarity, we would grant,
14:39:14 20 between types of charges, but the underlying facts
14:39:18 21 supporting those charges are completely dissimilar. We
14:39:20 22 have one drug conspiracy charge that was left in that
14:39:26 23 indictment; the other drug conspiracy charge was
14:39:28 24 dismissed. That drug conspiracy charge involved a
14:39:32 25 relatively short period of time in 2002 wherein Mr.

14:39:38 1 Wheeler and Mr. Pellegrini allegedly were involved in a
14:39:40 2 drug trafficking conspiracy, Pellegrini being the
14:39:44 3 Detroit boss of the Outlaws. Again, throughout
14:39:48 4 dissimilar, nothing that was ever brought up in the
14:39:50 5 course of this trial even, so that one clearly is a
14:39:54 6 matter which is dissimilar to this particular case.
14:39:56 7 There was an allegation of a drug conspiracy in earlier
14:40:00 8 years that remained in the RICO charge as one of the
14:40:04 9 racketeering activities. There may very well be some
14:40:10 10 overlapping testimony. But the Court will look at the
14:40:12 11 drug conspiracy charged in this case, it is abundantly
14:40:16 12 clear that Count 3, Racketeering Act 1A in this
14:40:20 13 indictment, focused upon the drug activities in the
14:40:24 14 Green Region, the Green Region only, whereas the Florida
14:40:28 15 indictment involved allegations, some of which are
14:40:32 16 specifically listed in that indictment, of drug
14:40:34 17 activities involving Mr. Wheeler in Florida.

14:40:36 18 So here you have our case for dissimilarity
14:40:42 19 is simply this: Yes, there is overlap with respect both
14:40:50 20 to allegations and evidence pertaining to the
14:40:52 21 enterprise, but that tells us nothing because even if
14:40:56 22 the enterprises are the same, double jeopardy is not
14:41:00 23 necessarily violated. We have to look to the
14:41:02 24 racketeering acts themselves. If you focused on the
14:41:04 25 racketeering acts themselves, you see a complete

14:41:08 1 dissimilarity. In Florida you see an indictment which
14:41:12 2 basically is based mostly upon the bombings, the
14:41:16 3 allegation that Mr. Wheeler hid Mr. Bowman during some
14:41:18 4 period of time, and obstruction of justice that related
14:41:22 5 to that, the Pellegrini situation up in Detroit, and
14:41:26 6 some drug conspiracy involving some acts down in Florida
14:41:28 7 during that time period.

14:41:30 8 If you look at the Toledo indictment, you
14:41:32 9 see a completely different conspiracy.

14:41:34 10 I think it's absolutely clear -- and again,
14:41:38 11 the Court has heard the evidence. We do stick with the
14:41:40 12 charges in the indictment, but both the indictment and
14:41:42 13 trial testimony made it abundantly clear that our drug
14:41:46 14 conspiracy was the Green Region distribution. Now,
14:41:50 15 true, it is true that some witnesses such as Ronnie
14:41:52 16 Talmadge, who testified both in Florida and here, talked
14:41:58 17 about the supply side of the drugs getting to Mr.
14:42:00 18 Wheeler. But our testimony focused on distribution
14:42:02 19 activities in the Green Region.

14:42:06 20 And double jeopardy is not offended in this
14:42:08 21 situation precisely for the legislative history as set
14:42:12 22 out in Dean in that Congress clearly anticipated that
14:42:16 23 there can be multiple prosecutions involving the same
14:42:20 24 enterprise where it is shown that that enterprise
14:42:22 25 engages in different courses of conduct in different

14:42:26 1 places at different times. And how could they draw an
14:42:32 2 organized crime statute that intended otherwise? And
14:42:36 3 the very nature of the statute presumes that there would
14:42:40 4 be multiple prosecutions of large-scale criminal
14:42:44 5 enterprises wherein the allegation in the enterprise is
14:42:48 6 absolutely identical, because the allegation is that the
14:42:52 7 enterprise over various periods of time has engaged in
14:42:56 8 illegal conduct in different places involving different
14:42:58 9 people and involving different kinds of criminality.

14:43:04 10 That is the essence of our argument here.

14:43:06 11 The Florida indictment focuses on Florida
14:43:08 12 activities and its substantial effect. The Toledo
14:43:12 13 indictment focuses on Toledo activities. The overlap
14:43:16 14 that has been cited by the defense, one aspect of that
14:43:22 15 is the so-called Sons of Silence bombing. In Florida,
14:43:26 16 because of the pattern of bombings that they had in
14:43:28 17 Florida, also chose to include an allegation that Frank
14:43:32 18 Wheeler was involved in the Sons of Silence bombing.
14:43:38 19 This indictment had the Sons of Silence bombing but did
14:43:40 20 not charge Frank Wheeler in it. So how can he be said
14:43:44 21 on that racketeering act to have been put in jeopardy
14:43:48 22 again up here? The allegation was against David Mays,
14:43:50 23 not Frank Wheeler. There is no allegation in the
14:43:54 24 Toledo indictment which mirrors or repeats the Florida
14:44:02 25 racketeering acts, and as such they stand as independent

14:44:08 1 racketeering acts, and whatever slight overlap there is,
14:44:12 2 I think it is abundantly clear if the Court looks at
14:44:16 3 both indictments that they are substantially different
14:44:20 4 with regard to the racketeering acts.

14:44:20 5 And the Courts have not required there to be
14:44:24 6 total exclusion, one to the other. There are cases in
14:44:26 7 which there is the overlap in terms of people, places,
14:44:30 8 and even time, and that sort of thing. So it's not a
14:44:34 9 situation where there must be a complete divergence of
14:44:38 10 racketeering acts. The question I think this Court
14:44:40 11 must determine and the sole question under double
14:44:42 12 jeopardy under Counts 1 and 2 is whether the Florida
14:44:50 13 racketeering acts are substantially the same as the
14:44:52 14 Toledo racketeering acts. I think the conclusion is
14:44:56 15 that they are not.

14:44:56 16 THE COURT: Thank you, Mr. Wilson.

14:44:58 17 Mr. Doughten.

14:44:58 18 MR. DOUGHTEN: Part of the fear of these
14:45:00 19 arguments, it exposes my ignorance, and I'll confess of
14:45:04 20 ignorance now. I did not know that Congress could
14:45:06 21 legislate out double jeopardy protections. And I guess
14:45:10 22 the point is, I don't know how the intent of Congress
14:45:14 23 can somehow change the analysis of whether Mr. Wheeler
14:45:22 24 has twice faced jeopardy for the same charges. The
14:45:24 25 intent of Congress was relevant to this particular

14:45:28 1 analysis. The question here is: Did he face the same
14:45:32 2 charge twice, in essence? And it's nice to hear Mr.
14:45:36 3 Wilson talk about that the enterprise is a legal
14:45:38 4 enterprise, which is not disputed; but clearly, again,
14:45:42 5 that's why I think the wording of the indictments and
14:45:44 6 the wording of the means and methods and purpose in both
14:45:48 7 indictments is very important. And let me indicate to
14:45:52 8 the Court what I mean. Under the means and methods,
14:45:56 9 this is identical language in both indictments; it's
14:45:58 10 indicated "to accomplish some of the purposes of the
14:46:00 11 enterprise, the defendant and others known and unknown
14:46:02 12 to the grand jury, among others, used the following
14:46:06 13 means and methods," then went through a number of
14:46:08 14 criminal acts. Clearly the government is indicating
14:46:14 15 that the purpose of the enterprise for the purpose of
14:46:16 16 the indictment was to commit criminal activity, part of
14:46:20 17 which was drug conspiracy. And I think a factor which
14:46:24 18 is small but shouldn't be overlooked is the Tampa
14:46:26 19 indictment, in talking about the drug conspiracy, said,
14:46:30 20 "In this district and elsewhere." The indictment
14:46:32 21 specifically noted "and elsewhere." It did not limit the
14:46:38 22 activities of the enterprise members to Florida alone.
14:46:42 23 It specifically said, "And elsewhere." Now, what "and
14:46:48 24 elsewhere" means to the grand jury, I don't know, but I
14:46:52 25 am presuming because they had all this testimony of a

14:46:54 1 Canadian supply, it came out in both trials, Canadian
14:46:58 2 supply, Milwaukee supplied to the enterprise, and Joliet
14:47:06 3 supplied to the enterprise. "And elsewhere" would
14:47:08 4 include total activities of the OMC. This is, again,
14:47:12 5 particularly important when the overt acts were to
14:47:16 6 fulfill the purpose of the enterprise, which clearly was
14:47:20 7 being charged, the members were being charged as well
14:47:24 8 with a pattern of corrupt activity. So again, I don't
14:47:28 9 think the intent matters; it's whether he faces the same
14:47:32 10 charges.

14:47:32 11 Again, this is essentially the same time
14:47:34 12 period. The Toledo indictment charges from 1988, I
14:47:38 13 think, through 2002; that encompasses the same period of
14:47:42 14 time in Florida. And I think it's important to note in
14:47:46 15 Florida clearly I think the inference can be made that
14:47:48 16 the prosecutor dismissed Count 3 because of fear of
14:47:52 17 double jeopardy. The whole reason Count 3 was dismissed
14:47:54 18 is so it wouldn't cause double jeopardy problems in
14:47:58 19 Toledo. Ironically, Racketeering Act 17 was left in
14:48:02 20 the Toledo indictment. And the wording of racketeering
14:48:06 21 act -- I'm sorry, was left in the Florida indictment --
14:48:14 22 is exactly the same. Is exactly the same. It's
14:48:16 23 within the same time period. The characters are the
14:48:18 24 same. Again, Mr. Wilson is correct in that the Courts
14:48:24 25 universally are essentially the same; the disagreement

14:48:28 1 between the parties is the Court's analysis of was it
14:48:32 2 the same time period, the same actors, was it
14:48:36 3 essentially the same purpose? In going through the test
14:48:38 4 we just have an honest disagreement as to whether those
14:48:42 5 tests are met or not. And I think it's important,
14:48:44 6 there's a warning in one of the cases that we cited in
14:48:48 7 our memorandum in response, and I'm not -- it's United
14:48:54 8 States v. Ciancaglini. In that case the Third Circuit
14:49:04 9 indicates in discussing RICO jeopardy what cannot be
14:49:08 10 permitted is a prosecutor purpose of tactically bringing
14:49:14 11 successive RICO prosecutions against one enterprise in
14:49:16 12 and around the same location and in the same timeframe.
14:49:20 13 So the question is: What is the same location? If
14:49:24 14 you're going to say city to city or district to
14:49:26 15 district, or are you're going to go by region? What's
14:49:28 16 interesting in this case is the OMC is a regional
14:49:32 17 organization. Well, an international organization.
14:49:38 18 So what is location? I would submit to the Court when
14:49:40 19 you're talking about all the players being members of
14:49:42 20 the enterprise, that they're called forth as witnesses
14:49:46 21 for the same purposes in both regions, that they're
14:49:50 22 called forth to testify as to the means and methods.
14:49:54 23 Again, in this case I do think it's significant that
14:49:56 24 numerous times there was other act evidence which was
14:50:00 25 admittedly admissible because it went to the means and

14:50:04 1 methods and purposes of the enterprise. It was
14:50:06 2 relevant for that purpose. On that same analysis, each
14:50:10 3 act by an enterprise was for the same purpose. Are
14:50:16 4 they distinct groups? No, it's all part of the
14:50:20 5 enterprise. Unfortunately, the United States Supreme
14:50:22 6 Court has not addressed this issue yet. So we're kind
14:50:26 7 of left out here to be in part circuit opinions.

14:50:30 8 THE COURT: Are you saying -- maybe I'm
14:50:32 9 misreading what you're saying, missing the analysis --
14:50:40 10 that multiple acts by members of the same enterprise or
14:50:46 11 conspiratorial group are merely the acts which give rise
14:50:58 12 to the violation as charged against the conspiracy?

14:51:04 13 MR. DOUGHTEN: That's part of it. The
14:51:08 14 other part of it clearly -- Mr. Wilson's right -- is
14:51:12 15 whether, in fact, it's the same acts. I agree with
14:51:14 16 that. And I think part of the determination of whether
14:51:18 17 it's the same act, albeit with a different charge,
14:51:22 18 whether it's the same activity and the same acts that
14:51:24 19 are being punished is -- and I think the Court can
14:51:28 20 consider the relevance of the purpose of the acts.

14:51:34 21 THE COURT: Thank you. I'd like, Mr.
14:51:34 22 Wilson, if you would comment please -- and this is
14:51:42 23 raised in defendant's briefs -- on the inclusion in the
14:51:50 24 Florida indictment of the recitation of the Florida, the
14:51:58 25 Green region, Oklahoma, et cetera, and in the beginning

14:52:06 1 of each of the charges, as referred to just now by Mr.
14:52:10 2 Doughten, the commission of these violations in the
14:52:16 3 "Middle District of Florida and elsewhere." Does the
14:52:24 4 fact that, one, the Green Region was mentioned; and two,
14:52:32 5 "and elsewhere" is utilized, I guess how does that
14:52:38 6 impact our decision here?

14:52:42 7 MR. WILSON: It shouldn't make any
14:52:44 8 difference at all. If you want to analogize, let's say
14:52:48 9 a group of executives from General Motors using General
14:52:52 10 Motors as an enterprise perpetrating fraud scheme. And
14:52:56 11 let's presume that one aspect of fraud occurs in San
14:53:00 12 Francisco; the other part occurs in New York. We would
14:53:02 13 describe General Motors the same way; we would say
14:53:04 14 General Motors is a company which deals with and sells
14:53:08 15 cars in California, New York and elsewhere.

14:53:12 16 THE COURT: So in other words, the precatory
14:53:18 17 language, if you will, at the beginning of the
14:53:20 18 indictment in both cases which recites the places in
14:53:24 19 which the enterprise operated, is just that, precatory;
14:53:30 20 and it's not until you get to the specific charges that
14:53:36 21 we look to the action?

14:53:40 22 MR. WILSON: Another precise reason why the
14:53:42 23 cases universally say, you look at the racketeering acts
14:53:46 24 themselves. The enterprise can be absolutely the same.
14:53:50 25 The language in this, the charging document, can be

14:53:54 1 absolutely the same. The analogy I gave, they describe
14:53:56 2 General Motors the same way; they're called an
14:53:58 3 international company doing business here, there,
14:54:02 4 everywhere. It would read exactly the same. And our
14:54:06 5 only question then, getting back to the issue, would be:
14:54:08 6 Look at the racketeering acts and see if, in fact, they
14:54:10 7 are charging different events, the substance of the
14:54:14 8 racketeering events.

14:54:16 9 Again, not to belabor the point that we have
14:54:20 10 made, in Dean there is an undeniable similarity between
14:54:24 11 the patterns of activities under these two RICO counts;
14:54:28 12 however, the similarity alone does not mean all the acts
14:54:34 13 charged are part of a single act. The mere fact is not
14:54:38 14 enough. The real question is looking at the
14:54:40 15 racketeering acts in Florida versus Toledo, can the
14:54:42 16 Courts say that we are looking at the same acts? And
14:54:48 17 all the Courts seem to imply that it's a substantial
14:54:54 18 recitation, both of being the same thing, not just some
14:54:56 19 similarity, not just overlap. Is the Florida charge
14:55:02 20 essentially the same racketeering acts as in the Toledo
14:55:04 21 charge? And then and only then does double jeopardy
14:55:08 22 preclude prosecution.

14:55:10 23 THE COURT: I thank you gentlemen. Did you
14:55:16 24 have something you wanted to add.

14:55:18 25 MR. DOUGHTEN: One last response. In

14:55:20 1 relation to, "And elsewhere." Now we're interpreting
14:55:24 2 what the grand jury meant.

14:55:24 3 THE COURT: I understand.

14:55:26 4 MR. DOUGHTEN: The "and elsewhere," if we're
14:55:28 5 talking about location, which all courts have done that,
14:55:32 6 I think that's an important factor. I think it's a
14:55:34 7 very important factor. And when the grand jury
14:55:38 8 obviously considered the extent and breadth of the OMC,
14:55:42 9 it included all territories, including this district, in
14:55:48 10 their consideration of what the enterprise was, and
14:55:50 11 where their operation was, and what the purpose was, and
14:55:54 12 what acts were done to fulfill the purpose within those
14:55:56 13 locations. I think that's very important language. I
14:56:00 14 don't think we can dismiss it as surplusage.

14:56:08 15 THE COURT: Gentlemen, I must tell you it is
14:56:10 16 always exhilarating to participate in, to listen to good
14:56:20 17 arguments which follow good briefs, and I appreciate
14:56:22 18 that. I am going to be out the balance of the week,
14:56:28 19 until Friday of next week. It ain't vacation, but I
14:56:38 20 will be at a district court meeting, and I will take
14:56:42 21 this material with me, together with a transcript of
14:56:44 22 your discussion, and try to reach, at least in my own
14:56:50 23 mind, a conclusion. Clearly Mr. Wheeler will not be
14:56:56 24 sentenced or even scheduled for sentencing until this is
14:56:58 25 disposed of.

14:57:02 1 I would like now to focus on Mr. Wheeler's
14:57:06 2 letter of August 23, which I have held until today, and
14:57:14 3 which copies were directed to both defense counsel here
14:57:18 4 and Mr. Wilson. Are you aware of this letter? Do you
14:57:26 5 have a copy in front of you?

14:57:28 6 MR. DOUGHTEN: Yes, we were both served with
14:57:30 7 the letter, Your Honor.

14:57:32 8 THE COURT: Do you wish to address the
14:57:34 9 letter now or have Mr. Wheeler address it? Now, he
14:57:44 10 denies that he is a trained lawyer, but it doesn't
14:57:52 11 appear to be so reflected in his letter. Better than
14:57:56 12 average lawyer work.

14:58:08 13 I don't care about the first page. I don't
14:58:12 14 care about the Brady violation at this juncture. I
14:58:18 15 care about the third issue to request and discharge my
14:58:24 16 present counselor and have new counsel appointed to
14:58:28 17 represent my interests. My present counsel should be
14:58:34 18 permitted to proceed with any motions, et cetera.

14:58:42 19 Unless there is a better reason than
14:58:46 20 articulated in this letter, I will not through
14:58:50 21 sentencing replace counsel which has served and served
14:58:56 22 well to this point, including trial and post-trial
14:59:02 23 motions. And it will be up to the Court of Appeals to
14:59:10 24 appoint counsel for an appeal, which I presume will be
14:59:16 25 taken in these cases. Is there a reason for appointing

14:59:28 1 new counsel prior to completion of sentencing?

14:59:56 2 (Discussion had off the record.)

14:59:56 3 MR. DOUGHTEN: Your Honor, I think what Mr.
14:59:58 4 Wheeler wants is a third party to discuss, I think,
15:00:04 5 whether this is better to pursue 2255, or he just wants
15:00:10 6 to talk to somebody to get another opinion.

15:00:12 7 MR. HELMICK: Somebody disinterested, I
15:00:16 8 think. Mr. Wheeler has suggested, for example, Your
15:00:28 9 Honor, if there is someone that could be made available
15:00:32 10 from one of the federal public defender's offices, for
15:00:36 11 example, perhaps just to give him independent, general
15:00:38 12 independent consult with regard to where he is right now
15:00:42 13 in light of what's occurred. In other words, he's
15:00:44 14 almost looking for advisory counsel.

15:00:46 15 THE COURT: On whether or not he should
15:00:48 16 appeal or wait for a 2255?

15:00:50 17 MR. HELMICK: I don't think there's any
15:00:52 18 question that if the Court doesn't grant his double
15:00:56 19 jeopardy motion in toto, that Mr. Wheeler will be
15:01:00 20 appealing. I don't think there's any doubt about that,
15:01:04 21 that an appeal will be pursued. But with regard to
15:01:06 22 other issues about performance of counsel, about
15:01:10 23 information or newly discovered evidence or other things
15:01:12 24 that may have come up that may be generally referred to
15:01:16 25 in that letter, Judge, I think you saw some of the

15:01:18 1 references that were in there. I think his request is
15:01:22 2 more along that line, and that's consistent, Judge, with
15:01:24 3 where he goes on to say, Well, could we stay on
15:01:28 4 basically through motion practice and things in the case
15:01:30 5 and perhaps work with his new counsel. I understand
15:01:34 6 the Court may not be willing to do that at this
15:01:38 7 juncture, but if somehow someone knowledgeable could be
15:01:40 8 made available to him to answer some questions in this
15:01:44 9 regard. I think I'm correct in relating his request at
15:01:48 10 this point.

15:01:50 11 (Discussion had off the record between Mr.
15:01:52 12 Wheeler and Mr. Helmick.)

15:01:56 13 MR. HELMICK: And the other kind of related
15:01:58 14 problem he's experiencing is with access to the law
15:02:02 15 library at Milan. He has requested additional time.

15:02:06 16 THE COURT: I would suggest -- I cannot
15:02:06 17 accept this as a motion under our court rules which
15:02:14 18 require all motions be filed by counsel of record. My
15:02:20 19 suggestion is to file the motion. I will tell you, I
15:02:28 20 cannot appoint another counsel. I'm prohibited from
15:02:30 21 doing so by Circuit rule. However, I will, once your
15:02:40 22 motion is filed, I'll take under consideration the issue
15:02:46 23 of the law library. I don't know how that's to be
15:02:50 24 articulated, but I will fax a copy of it to the public
15:02:58 25 defender in Cleveland and ask him for input with respect

15:03:06 1 to the request. That, I will do.

15:03:10 2 MR. HELMICK: Very good, Your Honor.

15:03:10 3 THE COURT: Anything further?

15:03:12 4 MR. HELMICK: Judge, I don't know if
15:03:14 5 there's -- I understand the problem with districts. I
15:03:18 6 don't know if Detroit would be easier in terms of
15:03:20 7 proximity or if it's simply easier --

15:03:24 8 THE COURT: I don't think I can do that. I
15:03:26 9 can't go out of district.

15:03:26 10 MR. HELMICK: All right. I just thought
15:03:30 11 in light of the fact he's at Milan, Detroit's a whole
15:03:32 12 lot closer.

15:03:34 13 THE COURT: They may suggest it. If they
15:03:34 14 work it between two districts, that's something else.
15:03:38 15 I agree with that.

15:03:38 16 MR. HELMICK: The only other matter is Mr.
15:03:42 17 Wheeler is experiencing some health problems that
15:03:44 18 requires some medication and testing. I already
15:03:48 19 related to the Marshals our urgent request he be
15:03:52 20 returned to Milan as soon as possible. He's obviously
15:03:56 21 not going to get it at the bullpen of the county jail.

15:03:58 22 THE COURT: Very good. I would hope that
15:04:02 23 will be accomplished as soon as possible. This week
15:04:06 24 hopefully.

15:04:14 25 THE MARSHAL: We'll see what we can do,

15:04:18 1 Judge.

15:04:18 2 THE COURT: Anything further? Thanks
15:04:20 3 again.

15:04:28 4 (Concluded at 3:04 p.m.)

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7 C E R T I F I C A T E

8

9 I certify that the foregoing is a correct transcript
10 from the record of proceedings in the above-entitled
11 matter.

12

13 /s Tracy L. Spore_____

14 Tracy L. Spore, RMR, CRR

Date

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